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IN THE

Supreme Court of the United States

October Term, 1955

No. 482

WHEC, INC., and VETERANS BROADCASTING COMPANY, INC., *Petitioners,*

v.

FEDERAL BROADCASTING SYSTEM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM A. ROBERTS
EDGAR TURLINGTON
600 Continental Building
1012 14th St., N. W.
Washington, D. C.

Of Counsel:

ROBERTS & MCINNIS
600 Continental Building
1012 14th St., N. W.
Washington, D. C.

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INDEX

	Page
Citation to Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument	5
Appendix	
Protest	1a
Reply to Motion to Strike Protest	9a
Affidavit of Gordon P. Brown	17a
Statement of Appellee re Certiorari	26a

CITATIONS

STATUTES:

Communications Act of 1934, as amended, 66 Stat. 711 (1952), 47 U.S.C.A., Sec. 309(a) et seq.	2
Section 309(c)	2
28 U.S.C., Section 1251(1)	2

CASES:

T. E. Allen & Sons, Inc., 9 Pike & Fischer R. R. 197 (1953)	5, 6
Camden Radio Co. v. *Federal Communications Commission*, 220 F. 2d 191 (D.C., 1955)	5, 6
Christianson, et al. v. *Gaines*, 85 App. D. C. 15 (1949)	7
Clarksburg Publishing Company v. *Federal Communications Commission*, 225 F. 2d 511 (1955)	5, 6
Connor, v. *Real Title Corporation, et al.*, 165 F. 2d 291 (4th Cir., 1947)	7
Crummer v. *DuPont*, 118 F. Supp. 870 (N. D. Fla., 1954)	8

Page

Fleming v. *Dierks Lumber & Coal Co.*, 39 F. Supp. 237 (W.D. Ark., 1941) 7
In re Application of Versluis Radio and Television, Inc., F.C.C. 53-314 (1953) 4, 6
Interstate Commerce Commission v. *Oregon-Washington R. & Navigation Co.*, 288 U. S. 14 (1933) .. 9
Massachusetts v. *Mellon*, 262 U. S. 447 (1923) 8
McCandless v. *Furlund*, 296 U. S. 140 (1935) 10
Metropolitan Television Co. v. *F.C.C.*, 221 F. 2d 879 (D.C., 1955) 5, 6
Muskrat v. *United States*, 219 U. S. 346 (1911) 8
National Broadcasting Co. v. *Federal Communications Commission*, 319 U. S. 239 (1943) 8
National Coal Association v. *Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951) 5, 6
New York, N. H. & H. R. Co. v. *New England Forwarding Co.*, 119 F. Supp. 380 (D.C. Rhode Island, 1953) 7
Ohio Valley Broadcasting Corp., 10 Pike & Fischer R. R. 452 (1954) 5, 6
Patroon Broadcasting Co., Inc., 9 Pike & Fischer R. R. 638 (1953) 5, 6
Salinas Broadcasting Corp., 9 Pike & Fischer R. R. 192 (1953) 5, 6
Sanders v. *Federal Communications Commission*, 309 U. S. 470 (1940) 3, 6, 8, 9
Shotkin v. *General Electric Co.*, 171 F. 2d 236 (10th Cir., 1948) 7
Upshaw v. *United States*, 335 U. S. 410 (1948) 10

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 225 F. 2d 560.

JURISDICTION

The judgment of the Court below was entered on July 28, 1955. The petition for a writ of certiorari was filed on October 21, 1955. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission and the Court below were in error in finding, upon the specific facts of this case, that respondent was a "party in interest" entitled to file a protest under section 309(c) of the Federal Communications Act of 1934, as amended.

2. Whether the Court below was in error in its determination that the protest filed by respondent in this case contained an articulated statement of a fact or situation which would tend to show, if established at a hearing, that the grant of a license to petitioners contravened public interest, convenience and necessity or that petitioners were technically or financially unqualified as licensees.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Act of 1934, as amended, are set forth in the petition at pages 3 to 5, inclusive.

STATEMENT

Petitioners, in 1952, filed mutually exclusive applications for a television license in Rochester, New York. On March 4 and 5, 1953, respectively, following an agreement between them to share time in the use of the channel sought, they amended their applications so as to make them no longer mutually exclusive. On March 9, 1953, the Commission accepted the amendments for filing and gave public notice of its action. On March 11, 1953, the Commission, without a hearing,

granted petitioners a television permit for share-time operation. On March 17, 1953, respondent filed, under Section 309(c) of the Federal Communications Act of 1934, as amended, a protest stating, among other things, that as a licensee of a standard broadcast station in Rochester it had an economic interest in the grants which was antithetical to petitioners under the doctrine of *Sanders* v. *Federal Communications Commission,* 309 U.S. 470; that petitoner, WHEC, Inc., is a subsidiary of the Gannett newspaper chain, which has a monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in the State of New York and elsewhere, and owns a number of broadcasting stations; that the owners of petitioner WHEC Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of newspapers; that the commercial policies of petitioner Veterans Broadcasting Company, Inc., accord neither with accepted practice nor the commitments made as an applicant; that undoubtedly these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time and thus avoid a hearing; and that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing. The allegations of the protest were amplified in a reply, dated March 31, 1953, to petitioners' motion to strike the protest.

The Joint Appendix designated by petitioners as a part of the record before this court includes a copy of the above-mentioned protest (p. 33), a copy of the

above-mentioned amplification of the protest (p. 67), and a copy of an affidavit of respondent's president regarding the injury and losses suffered by respondent as a result of the grants made to petitioners by the Commission (p. 21). These documents are reprinted, for convenience of reference, in the appendix to this brief.

Respondent's protest was allowed by the Commission and the effective date of the grants was stayed in a Memorandum Opinion and Order adopted April 1, 1953 (Petitioners' Appendix, p. 16a); but in a Memorandum Opinion and Order released July 27, 1953 (Petitioners' Appendix, p. 20a), the Commission reconsidered its action of April 1, 1953, and made its grants to petitioners effective immediately.

Respondent's petition for reconsideration of the Commission's action of July 27, 1953, was denied in a Memorandum Opinion and Order released May 3, 1954 (Petitioners' Appendix, p. 25a). Respondent thereupon appealed to the Court below.

The Court below approved without discussion the Commission's holding that respondent was a "party in interest" entitled to file a protest. It stated that the Commission had, in the Court's opinion, properly so held.

The Commission had, in fact, beginning with its decision in the *Versluis* case (*In re application of Versluis Radio and Television, Inc.*, FCC 53-314, adopted March 23, 1953), consistently held that a licensee of a standard broadcast station filing a protest which contains allegations sufficient to indicate economic injury by the proposed operations of a television applicant is a "party in interest" within the

meaning of Section 309(c) of the Act. *Salinas Broadcasting Corp.*, April 7, 1953, 9 Pike & Fischer R.R. 192; *T. E. Allen & Sons, Inc.*, April 8, 1953, *Ibid.*, 197; *Patroon Broadcasting Co., Inc.*, July 22, 1953, *Ibid.*, 638; *Ohio Valley Broadcasting Corp.*, April 15, 1954, 10 Pike & Fischer R.R. 452. The Court had, moreover, in *Clarksburg Publishing Company* v. *Federal Communications Commission*, 225 F. 2d. 511, approved the Commission's interpretation of the words "party in interest" in the *Ohio Valley Broadcasting* case and had cited in support of that interpretation the decision of this Court in the *Sanders* case, 309 U.S. 470, and three of its own decisions: *Metropolitan Television Co.* v. *Federal Communications Commission*, 221 F. 2d. 879; *Camden Radio Co.* v. *Federal Communications Commission*, 220 F. 2d 191, 195; and *National Coal Association* v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F. 2d 462.

The decision of the Court below that respondent's protest should not have been dismissed by the Commission was based upon the Court's view that the protest contained an articulated statement of a fact or situation which would tend to show, if established at a hearing, that the grant of licenses to petitioners contravened public interest, convenience and necessity, or that petitioners were technically or financially unqualified, contrary to the Commission's initial finding.

ARGUMENT

On the facts of the case the decision of the Court below is clearly correct. There is no asserted conflict of decision. There is no important question of Federal law that requires decision by this Court.

I.

THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT

The question suggested by petitioners (p. 2), whether a late-filing applicant is a "party in interest" under Section 309(c) of the Federal Communications Act, is not properly presented to this Court. The Court below disposed of respondent's argument that it was entitled to a hearing before the Commission on the basis of its late-filed application. Respondent has requested no relief from the Court's rejection of that argument.

The decision of the Court below, insofar as it approved the decision of the Commission in this case and in the above-cited cases of *Versluis, Salinas, Allen, Patroon,* and *Ohio Valley Broadcasting Company,* is fully supported by the decision of this Court in the *Sanders* case as well as by the decisions of the Court below in the *Clarksburg, Metropolitan, Camden,* and *National Coal Association* cases. The key words of the *Sanders* decision, from the point of view of the determination of parties in interest, are "one likely to be financially injured by the issue of a license" (309 U.S. 477). It is significant that a writ of certiorari has not been sought in any of the District of Columbia Circuit cases cited above.

The Court below considered it to be "clear from a reading of the statute and its history that Congress sought to require one protesting a unilateral grant of a license by the Commission to show in detail the factual basis of his grievances". There must be "some specification of events and circumstances", but the requirement of Section 309(c) of the statute was not to be measured by "the technicalities of pleading form-

erly applicable in civil litigation". Citing *Christianson* v. *Gaines* (85 App. D.C. 15), *Shotkin* v. *General Electric Co.* (171 F. 2d 236) and *Fleming* v. *Dierks Lumber & Coal Co.* (39 F. Supp. 237), the Court stated (225 F. 2d 563):

> "What is required is merely an articulated statement of some fact or situation which would tend to show, if established at the hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding."

It is submitted that "the technicalities of pleading" which were eliminated from civil litigation by the cooperative efforts of bench and bar nearly twenty years ago are, *a fortiori*, inapplicable in administrative proceedings.

It is submitted, further, that the cases cited by petitioners (p. 20), in which it was held that the circumstances alleged to constitute fraud or mistake must be stated with particularity, are not helpful to petitioners. In the first of these cases, *New York, N.H. & H. R. Co.* v. *New England Forwarding Co.*, 119 F. Supp. 380, the Court stated, at page 382, that where fraud is alleged, "enough facts must be set out to apprise the adversary as to what facts are relied upon as constituting fraud" and that "neither the original nor the amended complaint alleges or sets forth *any* facts pertaining to fraud" (emphasis supplied). In the second case, *Connor* v. *Real Title Corporation*, 165 F. 2d 291, the Court found, at page 294, that the plaintiff's averment of "a vicious conspiracy and collaboration" was "unsubstantiated by *any* facts disclosed in the pleadings" (emphasis supplied). In the third

case, *Crummer Co.* v. *Du Pont,* 118 F. Supp. 870, the specific question before the Court was stated by the Court, at page 871, to be "whether the facts alleged in the complaint, on plaintiff's claim of fraudulent concealment, are legally sufficient to toll the statute of limitations". The Court, after full consideration of all the allegations of the complaint, found and held, at page 376, that the complaint failed to allege sufficient facts to make an issue on the question of fradulent concealment. Each of these cases involved the application of Rule 9(b) of the Federal Rules of Civil Procedure, and in none of these cases was there any approach to the degree of particularity which the Court below found to exist in the present case.

Petitioner's attempt to bring a constitutional question into this case is wholly unwarranted. As observed by Mr. Justice Frankfurter in *National Broadcasting Co.* v. *Federal Communications Commission,* 319 U.S. 239, at page 259, "Whatever doubts may have existed as to whether the ingredients of 'case' or 'controversy' . . . are present in this situation were dispelled" by this Court's "ruling in the *Sanders Bros. Radio Station* case that the legality of a Commission order can be challenged by one 'aggrieved' or 'whose interests are adversely affected' thereby, even though the source of his grievance is not what is claimed to make the order unlawful". We do not have here, as in the *Muskrat* case (*Muskrat* v. *United States,* 219 U.S. 346), cited by petitioners (p. 17), an attempt to obtain an advisory opinion from a court, nor, as in the *Mellon* case (*Massachusetts* v. *Mellon,* 262 U.S. 447), also cited by petitioners (p. 17), a situation in which a person "suffers in some indefinite way in common with people generally". We have on the con-

trary, as this Court said in the *Sanders* case (309 U.S. 477), a situation in which Congress "may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license". This Court held specifically in that case that "it is within the power of Congress to confer such standing to prosecute an appeal". It had previously held, in *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.,* 288 U.S. 14, 26, that, under Section 2 of the Commerce Court Act, an aggrieved party may challenge a decree "not only to vindicate his own rights, but those of the United States as well".

II.

THERE IS NO ASSERTED CONFLICT OF DECISION

It is pertinent to note that the decision of the Court below in the present case, on the sufficient particularity of the allegations of a protest, has been cited and relied upon by the Commission in its Memorandum Opinions and Orders of November 2, 1955, upon the applications of Elyria-Lorain Broadcasting Co., FCC 55-1061; Richland, Inc. (WMAN), FCC 55-1062; and WBUF-TV, Inc. (assignor) and National Broadcasting Company, Inc. (assignee), FCC 55-1064.

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW THAT REQUIRES DECISION BY THIS COURT

The government after mature consideration of the possibility of filing a petition for a writ of certiorari, decided against doing so. See statement of Appellee, September 8, 1955, copied in the appendix hereto.

Petitioners have an obvious interest in continuing their profitable operations as long as possible; their decision to seek a writ of certiorari can hardly have been predicated primarily upon a conviction that a decision by this Court is necessary in the public interest.

There is no question here, as in the *McCandless* case (*McCandless* v. *Furlaud,* 296 U.S. 140), cited by petitioners (p. 15), of the possibility that a former decision of this Court may require reconsideration.

There is no question here, as in the *Upshaw* case (*Upshaw* v. *United States,* 335 U.S. 410), cited by petitioners (p. 15), of the settlement of a matter of Federal practice.

We have here merely the question whether the Court below has correctly applied clear principles of law to the facts of a single case.

The petition should be denied.

Respectfully submitted,

WILLIAM A. ROBERTS
EDGAR TURLINGTON
600 Continental Building
1012 14th St., N. W.
Washington, D. C.

Of Counsel:

ROBERTS & MCINNIS
600 Continental Building
1012 14th St., N. W.
Washington, D. C.

APPENDIX

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(1) Protest to Grant of Applications, and Request for Hearing

Comes now Federal Broadcasting System, Inc., Rochester, New York, and, pursuant to Section 309(c) of the Communications Act of 1934, as amended, protests the action of the Commission of March 11, 1953, in granting the above entitled applications, and requests that the applications be designated for hearing.

In support of its protest, petitioner states as follows:

1. Petitioner is the owner and licensee of Standard Broadcast Station WSAY, operating at Rochester, New York. Petitioner has today filed with the Commission application for construction permit to erect a new television broadcast station to operate at Rochester, New York, on Channel 10.

2. On March 12, 1953, the Commission announced in Report No. 2196, TV Broadcast Actions, that it had granted applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., for permits to construct new television broadcast stations at Rochester, New York, to share time on Channel 10, with effective radiated power of 118 kw visual, 59.2 kw aural, and an antenna height of 351
380 feet above average terrain, Commissioners Walker and Merrill having voted to defer action.

3. Prior to March 4, 1953, the application of WHEC, Inc., specified unlimited hours of operation for the station proposed to be operated by it on Channel 10. On that date the Commission received an amendment changing the hours of operation requested to sharing with the station proposed by Veterans Broadcasting Company, Inc., and making substantial other changes in the applicant's proposal. The application of Veterans Broadcasting Company, Inc., likewise originally requested unlimited time on Channel 10. On March 5, the Commission received an amendment specifying part-time operation, its station to

share time with the station proposed by WHEC, Inc., and making other changes in the application. Receipt of the amendments was not announced by the Commission until March 9, 1953 (Report No. 4464 of Broadcast Applications Accepted and Tendered for Filing), when they were announced as accepted for filing. On March 11, the applications as amended were granted by the Commission without hearing. The action was not announced until 3:00 p.m. in the afternoon of March 12, however.

4. The sole stockholder of the petitioner corporation is Gordon P. Brown, who became the owner and operator of Station WSAY in 1936. Radio has been his avocation and vocation since his youth. He made at home the first television receiver ever seen in Rochester. In 1933 he became interested in constructing a television transmitter and investigated the possibilities, but found that the Commission was issuing only experimental authorizations. Early in 1948, he began preparation of an application for a permit to construct a television broadcast station at Rochester. Inasmuch as Pinnacle Hill, a site owned and controlled by the licensee of Station WHAM, was the only satisfactory site for a television station to serve
381 Rochester, he negotiated with Mr. William Fay, General Manager of WHAM, for location of a television transmission system on Pinnacle Hill, the site of WHAM-TV. Mr. Fay, however, refused to permit installation on WHAM's property of the television transmission plant proposed by Mr. Brown. In a telegram dated April 14, 1948, to counsel for Mr. Brown, Mr. Fay stated, "We do not wish to make further commitments regarding use by WSAY of our site on Pinnacle Hill." Mr. Brown subsequently filed a protest to Mr. Fay's action with the Federal Communications Commission. An application was completed except with respect to the engineering data, which could not be completed because of inability to conclude arrangements for a satisfactory site. The filing was held in abeyance pending further negotiations with respect to

the transmitter site and no satisfactory solution had been reached when the freeze on construction of television stations was announced.

Following the ending of the freeze, Mr. Brown made arrangements to acquire possession of property higher on Pinnacle Hill than the WHAM-TV transmitter site and took additional steps to perfect his application for Channel 10. Time-consuming investigations and negotiations preceded the acquisition of the property and lengthy negotiations for obtaining permission from the Town of Brighton to erect a 200-foot tower by the property followed. The negotiations commenced, in fact, prior to the ending of the freeze and were extended primarily because of objections to the tower by WHAM and the American Telephone and Telegraph Company, which owns property adjacent to that purchased by Mr. Brown. It was because of the lengthy negotiations for authority to erect a tower on the proposed site that an application to the Commission was not filed months ago. In the meantime arrangements were completed between WHEC, Inc., and WHAM, and between Veterans Broadcasting Company, Inc., and WHAM, for installation of television antennas on the WHAM-TV tower.

382 5. Throughout petitioner's difficulties in regard to obtaining a satisfactory transmitter site the applications of both WHEC, Inc., and Veterans Broadcasting Company, Inc., specified unlimited hours of operation and were mutually exclusive. Under Commission procedure there was no reason to expect a final decision or a hearing on either application for many months, perhaps years. Because of the lack of public notice by the Commission of the tender of the amendments specifying a sharing-time arrangement for the stations proposed by WHEC and Veterans until scarcely 40 hours before the grant of the applications, petitioner had insufficient time following such notice to complete the application then in preparation.

6. Petitioner's application for construction permit has been completed and tendered to the Commission and petitioner desires that it be accepted for filing and designated for hearing with the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., as mutually exclusive applications. Petitioner submits that he is a party in interest with respect to these applications granted on March 12, first, because the grants do not become final until the expiration of the 30-day period following the grants and petitioner has filed a mutually exclusive application; second, the failure of the Commission to make adequate announcement of the amendments, which made the applications eligible for a grant without a hearing, deprived petitioner of due process; and, third, both as an applicant for television facilities in Rochester and the licensee of a standard broadcast station in Rochester petitioner has an economic interest in the grants which is antithetical to WHEC, Inc., and Veterans Broadcasting Company, Inc., under the doctrine of *Sanders* v. *Federal Communications Commission*, 309 U.S. 470.

383 7. A consideration of the legislative history of the Communications Act amendments of 1952 indicates that "parties in interest" from an economic standpoint are defined by the Supreme Court decision in the Sanders Case, which held that a person with an adverse economic interest has a right of appeal from a Commission decision. In Senate Report No. 44, on S. 658, 82nd Congress, 1st Session, page 8, it was stated that "fear has been expressed that the use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest, but solely with the purpose of delaying license grants which properly should be made". Petitioner believes, however, that it has a "legitimate interest". It does not seek intervention solely with the purpose of delaying license grants which should properly be made, but comes within the definition of a party in

interest as intended by Congress, regardless of its economic interest antagonistic to that of Veterans and WHEC.

Although holding that an AM licensee was not a party in interest as a result of economic interest in the matter of a grant of television facilities (In re Application of Versluis Radio and Television, Inc., adopted February 5, 1953) the Commission recently recognized that the Sanders doctrine was applicable to persons filing applications for television facilities.

It should be noted that the Department of Justice takes the position that the term "party in interest" is not limited to those parties suffering electrical interference (the KOA case) or economic interest (the Sanders case). The Department has taken the position in the Transit Riders' Inc. case presently in the Court of Appeals for the District of Columbia, that public citizens having no direct financial interest in broadcasting should be considered embraced within the term. The concession by the Justice
384 Department that radio listeners should have stood before the Commission is urged by Petitioner to demonstrate its own standing, not only as an interested party, but further, as a candidate for the television facilities designated by the Commission's order of March 11, 1953.

8. Petitioner urges that the basic purpose of 309(c) of the Communications Act, as amended, is to permit protests to unreasonable grants made prior to an opportunity for a study and objection to applications for radio or television facilities. This was recognized by the Commission through Commissioner Hyde, who, in testifying for it before a subcommittee of the Senate Committee on Inter-State and Foreign Commerce, with respect to Section 8 of S. 1973 (which contained phraseology virtually identical with that now in Section 309(c) of the statute), in a prepared statement said:

"It is difficult to ascertain why the cumbersome procedure set forth in Section 8 is considered desirable. If it is believed that the Commission *acts on applications too soon after they are filed, or does not permit an adequate opportunity for members of the public to present any relevant information* they may have, a better method exists for achieving this result." (Emphasis added)

Despite the objections of the Commission, Congress incorporated Section 8 of S. 1973 into the public law with inconsequential changes, and petitioner consequently urges that under the circumstances of the present case he is entitled to a hearing on the assignment of Channel 10 in Rochester, New York. Any other procedure would result in injury to petitioner and denial of the procedural due process assured to it under the Fifth Amendment to the Constitution of the United States. Denial of a hearing in such cases could result in the grossest abuse of administrative procedure and constitutional guaranties. Should petitioner's protest to the Commission's actions of March 11 be rejected,

385 the door is open for the speeding of the processing of applications to the extent that an applicant might, in an extreme case, receive a grant immediately after a rule making such a grant possible becomes effective, and thus make the grant immune from attack by other parties having an interest therein. The Commission has recognized in certain instances that such abuses might occur and has attempted to safeguard against them by announcing that applications would not be considered until a certain period has elapsed. For the same reasons that influenced the Commission in those well known instances, protests to the grants to WHEC and Veterans applications, made so quickly after amendment of the applications to eliminate mutual exclusivity, should be considered. Applicants should not be permitted through collusion with one another, and the taking advantage of the Commission's procedures, to avoid a hearing and to destroy a competitive situation of the type fostered by the Commission. The least that

should be expected of the Commission is careful scrutiny of the qualifications and proposals of the applicants in this instance by means of a hearing.

9. Petitioner avers and verily believes that competent testimony submitted at a competitive hearing would disclose that neither WHEC, Inc., nor Veterans Broadcasting Company, Inc., could prevail against petitioner. WHEC, Inc., is a subsidiary of the Gannett Newspaper chain, which has monopoly of the daily newspapers in the City of Rochester, besides a standard broadcast station, owns and publishes newspapers in various other cities in New York and elsewhere, and owns a number of broadcasting stations. Unlike this petitioner, the owners of WHEC, Inc., engage in broadcasting as a business activity secondary to their principal business, the publishing of newspapers. It is doubted that the financial qualifications of Veterans Broadcasting Company, Inc., could withstand the
386 careful scrutiny to which they would be subjected at a competitive hearing, and the commercial policies by which they conduct WVET accord neither with accepted practice nor the commitments made as an applicant. Undoubtedly, these weaknesses and others of these two applicants influenced them in their decision to amend their applications to request authorization to share time on Channel 10 and thus avoid a hearing. It is submitted, also, that the proposal to operate the two stations through a joint transmitting plant involves legal and factual questions which should have been more fully considered in a hearing.

10. Petitioner is aware of the provisions of Section 1.382(b) of the Commission's Rules and Regulations which requires that an application to be considered mutually exclusive with applications already on file must be filed not later than the close of business on the day preceding the day on which the Commission takes action with respect to the applications previously filed. Petitioner submits,

however, that the Rule is in conflict with the provisions of Section 309(c) of the Communications Act, as amended, and does not afford due process to other parties in circumstances such as these. Under the particular circumstances of this case strict application of such a Rule works a grave injustice.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner respectfully prays that the Commission:

(a) Accept for filing Petitioner's application for permit to construct a new television broadcast station at Rochester, New York, to operate on Channel 10;

(b) Rescind the action of March 11 granting the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc.; and

387 (c) Designate the applications of WHEC, Inc., and Veterans Broadcasting Company, Inc., for hearing in a consolidated proceeding with petitioner's application.

Respectfully submitted,

FEDERAL BROADCASTING SYSTEM, INC.

By GORDON P. BROWN
Gordon P. Brown, *President*

March 17, 1953

Subscribed and sworn to before me this 17th day of March, 1953.

ROBERT E. GORISH
Notary Public

(SEAL)

My commission expires March 31, 1956.

(2) Reply to Motion to Strike Protest and Motion to Return Application of Federal Broadcasting System, Inc.

Federal Broadcasting System, Inc., by its Attorneys, hereby submits its reply to the motion of WHEC, Inc. (hereinafter referred to as WHEC), and Veterans Broadcast Corporation, Inc. (hereinafter referred to as Veterans) to strike the Protest to Grant of Applications and Request for a Hearing and motion to return the application of Federal Broadcasting System, Inc., for permit to construct a new television station to operate on Channel 10 at Rochester, New York.

In support thereof, Federal Broadcasting System, Inc. (hereinafter referred to as Petitioner), states as follows:

1. Petitioner's careful consideration of the said motion to strike petitioner's protest fails to reveal any matters in fact or in law tending to jeopardize petitioner's position in this matter. Respondent's delineation of the law prior to the 1952 amendments to the Communications Act, as amended, is interesting and, had the McFarland Bill not been passed by the 82nd Congress, would have been of considerable validity. The obvious intent and purpose
416 of Section 309(c) of the Communications Act, as amended, added thereto by the 82nd Congress, have been set out in detail by petitioner's original pleading in protest of the grant to WHEC and Veterans. Since the filing of the said original pleading petitioner has noted with satisfaction the Commission's Memorandum, Opinion and Order in the *Versluis* case, FCC 53-314, released March 23, 1953, wherein the Commission held that a standard broadcast licensee was a "party in interest" within the meaning of Section 309(c) and might protest a grant of television facilities, though the standard broadcast licensee was not an applicant for a television station. In confirming the position of petitioner herein, the Commission in the *Versluis* opinion made it evident that Federal, as licensee

of standard broadcast station WSAY, was a party in interest in the instant proceedings and therefore entitled to legal and equitable protest of the untimely grant of television facilities to the combined applicants, WHEC and Veterans.

Further, a recent decision of the Court of Appeals in *National Coal Association* v. *Federal Power Commission*, 191 F. 2d 462 (1951, CCA of D. C.), confirms analogously, in the realm of federal power regulation, the standing of petitioner in the field of radio and television. In the National Coal Association case it was held that the Association, the United Mine Workers, and the Railroad Labor Executive Association were sufficiently parties in interest to protest a certificate of public convenience and necessity issued by the Federal Power Commission to a gas pipeline. In that case, as in this, a grant of authority would have an impact upon the business of protestants. As pointed out in petitioner's original pleading, as licensee of WSAY it falls squarely within the purview of the letter and spirit of new Section 309(c).

2. Respondents have contended with prolixity that petitioner has not apprised them of specific and detailed
417 facts "with minute particularity" as to the reasons why the tentative grant to WHEC and Veterans is not in the public interest. Respondents rely in great measure in the Versluis Memorandum, Opinion and Order, on the alleged particularity with which facts were set forth in the protest in that case. And well might respondents grasp at any apparently available straw in an effort to avoid the direct, clear and unequivocable ruling of the Commission in the Versluis opinion. Petitioner points out, however, that in the Versluis case the protestant alleged economic injury and sought to show that a grant of television facilities to his competitor was not in the public interest; in the instant case, however, petitioner seeks primarily not a finding by the Commission that a grant to

WHEC-Veterans is not in the public interest, *per se*, but rather that a comparative hearing should and must be held in order that the Commission may determine which of the applicants, Federal or WHEC-Veterans, is better qualified to serve the public.

3. Petitioner's station WSAY relies upon advertising business of merchants in Rochester and vicinity, and that of national advertisers desiring to reach potential customers in the Rochester trade area, for the income necessary to operate the station. The television stations proposed to be erected by WHEC and Veterans will rely upon those same advertisers. They will make demands, also, upon the program sources upon which Federal must rely, increasing the expense of operating Federal's station, WSAY. Thus, there will be added to the existing competition, and the present economic hardships to which Federal is subjected, the competition of two additional TV stations —stations whose owners already have unfair competitive advantage by reason of affiliated business interests and unfair trade practices. As shown by Federal's application for permit to construct a television broadcast station
418 in Rochester, Federal's station WSAY is already operating at a loss. It has operated at a loss continuously since several years ago, when, at approximately the same time, three additional standard broadcast stations, including WVET, were constructed in Rochester pursuant to authority of the Commission. WSAY's losses during the past five years have been in excess of $150,000, though they have gradually decreased to the point where petitioner had hope of eliminating them—a hope that certainly cannot be realized if WHEC and Veterans are permitted to operate TV stations in competition therewith and in accordance with certain practices heretofore followed by them.

4. Petitioner urges that the Commission afford serious consideration to respondents' apparent great fear of the outcome of such a comparative hearing. Federal has not

and does not urge that it should receive a grant of Channel 10 in Rochester and that the application of WHEC-Veterans should be disregarded; instead, petitioner is confident that the facts brought out in a full and complete hearing, as required by the Communications Act, as amended, and the Commission's Rules and Regulations, will reveal that operation on Channel 10 by Federal would be more in the public interest than such operation by WHEC-Veterans.

In particular, petitioner submits that a grant to WHEC-Veterans in the light of reciprocal sell-out provisions in a contract between WHEC and Veterans is but a subterfuge for permitting WHEC to receive a grant at this time in conjunction with Veterans and, after a decent interval, purchase the interest of Veterans and thus tend further to create a communications monopoly in the City of Rochester. In this connection petitioner shows that WHEC is owned by the Gannett newspaper chain which also owns the only two daily newspapers in the City of Rochester, and a grant of television facilities to WHEC would tend further
419 toward a "concentration of the media of mass communications in a single corporate entity" throughout the Rochester area. The communications media controlled by Gannett Co., Inc., and by Frank E. Gannett, as set forth in WHEC's application, are listed in Appendix A, attached hereto. Various aspects of monopolistic control have ever been of primary and vital concern to the Commission.

5. Not only does the Gannett organization have control over large and important segments of the media of mass communication in the Rochester area, but it has been guilty of using such control to further its own broadcast interests in competition with others. For example, over the protests of WSAY, the Gannett newspapers have persisted in designating in published schedules programs of WSAY as "records" while refraining from describing in similar fashion record programs in WHEC's schedules. Though

a small thing in itself, such practices over a period of time have an accumulative harmful effect.

The influence of the newspapers is felt in many ways, of course. The advantage of newspaper affiliations, for publicity reasons, in arranging network affiliations is an important one. Certainly, petitioner, and probably other Rochester stations, have been unable to obtain the valuable newspaper publicity for their programs that WHEC has had. Furthermore, though the Commission has made clear that it regards equal opportunity for presentation of all views on controversial questions essential to fair play and service in the public interest, the newspapers are subject to no such influence. Thus, while WHEC and Veterans expressed their views in the Rochester newspapers concerning this protest, a request that a letter from this protestant to the managing editor of the Rochester Times-Union presenting protestant's views on the matter was ignored. The letter is attached hereto as Appendix B.

420 It is submitted that, without doubt, the factors of newspaper control, lack of integration of ownership, with management, and lack of diversification of ownership, all unfavorable to WHEC, influenced that applicant in its decision to accept part-time operation on Channel 10 rather than risk a competitive hearing. These are issues that should have been determined in a hearing, even though amending the application removed all conflict with pending applications.

6. Veterans Broadcasting Co., Inc., has had financial difficulties in which one of the Rochester banks became involved to the extent of $100,000 or more, and, this circumstance, or pressure brought to bear upon certain merchants by the bank resulted in their placing their advertising with WVET. WVET, in fact, has operated, almost since its inception, in a manner indicating lack of financial health. Notwithstanding promises in the Veterans applications to limit the commercial content of programs acceptably, WVET broadcasts regularly a 30-minute program in which

the entire time is devoted to commercial advertising, as can be proved through recordings. Other commercial tactics of WVET have been of such a character that petitioner prefers to operate unprofitably rather than to degrade its programs through adoption of such questionable practices. Such practices, related to the sale by a New York brokerage firm of time on WVET, on its own forms, resulted in at least one complaint to the Commission (by the Skuse Shoe Co.) concerning them. While some of these matters undoubtedly came to the Commission's attention in the past, others have not. In any event, a hearing on the Veterans application should be held, to determine the financial and other qualifications of this applicant.

7. Both WHEC and Veterans have arbitrarily refused, contrary to the Commission's rules, requests by WSAY for permission to rebroadcast sponsors' programs
421 broadcast by those stations, in which programs they do not own property rights. The Commission has clearly stated that such refusals are not in the public interest. Such refusals not only adversely affect WSAY economically but prevent a large segment of the public from hearing the programs. It is petitioner's contention that such actions should be considered in connection with the qualifications of WHEC and Veterans to operate additional broadcast stations.

8. Evidence relating to all the foregoing specific matters will be adduced by WSAY in "minute particularity" at the formal hearing requested by petitioner's original pleading in this matter. Petitioner stands ready to furnish facts relating to all of the aforementioned aberrations of WHEC and/or WVET at a hearing or other fact finding investigation conducted by the Commission.

9. In support of its motion that petitioner's application be returned, WHEC and WVET have sought to show that petitioner delayed filing a television application only because of lack of interest in doing so. However, the files

of petitioner disclose an application complete as of April 27, 1948, except for engineering, and another dated 1952, also substantially complete except for engineering, which, in both instances, was not completed because of uncertainty as to transmitter site.

In footnote 3 to the reply of WHEC-Veterans, Mr. Brown is quoted as saying that he was "not so interested in television." Other portions of the minutes mentioned, including the paragraph from which a sentence was quoted, indicated his interest in constructing a tower to
422 support one or more television antennas.[1] Furthermore, he was aware of the fact that friends of his competitors were members of the board and he therefore did not wish to reveal more than necessary of his television plans. The telegram[2] dispatched to the Commission by Mr. Brown on April 27, 1948, indicates the intentions of petitioner as of that date. Unfortunately, the application and other data mentioned in the telegram were not filed because

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[1] Mr. Ely: Do I understand that you have broadened your requests? You were talking two-way radio, which had nothing to do with television.

Mr. Brown replied that it was correct. He had talked of two-way radio, that it is possible that the request may be broadened, inasmuch as he has the location.

Mr. Furmoile: I assumed that your application was for radio, now it seems to be radio and television.

Mr. Brown then went on to say about the grant being made and the interest he had in the Board of Education using his tower, further that there were five channels available, that he was refused position on the present tower and when he was refused he had to buy his own position.

Mr. Brown: In order for me to file an application with FCC I have to have a site that I can use. The other two went to Stromberg-Carlson and they gave approval, which prevented WSAY from filing an application two or three years. I am not so interested in television until I can see that it will pay off. I am interested in the two-way system. All I want to do is to put the tower up there. We have five channels coming to Rochester, there is no question about it. They can handle three, I can handle two. The Board of Education station has actually been granted.

[2] WSAY has been refused permission to use Pinnacle Hill site of WHAM television transmitter in apparent violation of F.C.C rule relating to availability of television sites by all applicants.

Television applicants WHEC and WARC have been granted the right to use Pinnacle Hill site by WHAM.

Since refusal to WSAY to use site apparently is for the purpose of forestalling WSAY application until the applications of WHEC and WARC are granted by F.C.C. I urgently request the Commission's investigation into the situation before the granting of the applications of WARC and WHEC without a hearing.

I am forwarding complete data to you via my attorney tomorrow.

of subsequent announcement by the Commission of proposed reallocation of television channels and the holding of a hearing on that and related matters. The "freeze" followed the initial hearings and the Commission requested that no applications be filed until the proceedings were concluded. The minutes of the meetings of the Planning Board of Brighton indicate the continuing efforts made by Mr. Brown to obtain a satisfactory antenna site
423 despite obstacles placed in his way, directly or indirectly, by others, including the parties most interested in reducing competition for television channels in Rochester.

WHEREFORE, Protestant prays that the Motion to Strike Protest and Motion to Return the Application of Federal Broadcasting System, Inc., be dismissed and, as requested in protestant's original pleading herein, these matters be designated for formal hearing by the Commission in accordance with the law.

Respectfully submitted,

FEDERAL BROADCASTING SYSTEM, INC.

By GORDON P. BROWN
Gordon P. Brown, *President*

March 31, 1953

Subscribed and sworn to before me this 31st day of March, 1953.

VERA B. HOPKINS
Notary Public

(Seal)

My commission expires Oct. 14, 1956.

(3) Affidavit of Gordon P. Brown in Support of Appellant's Motion for Interlocutory Injunction

District of Columbia, City of Washington, ss:

Gordon P. Brown being duly sworn, deposes and says:

(1) I am the president and controlling stockholder of the Appellant herein, Federal Broadcasting System, Inc. (hereinafter called Appellant). Appellant has been the owner and operator of Station WSAY since 1936. Deponent states that since his youth both his vocation and avocation have been in the radio electronics art. He constructed in 1927 the first television receiver ever seen in the city of Rochester. His interest in television commenced as early as 1933, when he investigated the possibility of constructing a commercial television transmitter, but learned that the Commission was only issuing experimental authorizations. He has been in the radio broadcasting buisness for the past thirty years in various capacities not only as owner and operator of the station but also in sales, administrative and programming capacities.

(2) The notice of appeal herein sets forth the facts and matters upon the basis of which review is sought of the Memorandum Opinion and Order of the Federal Communications Commission issued May 3, 1954 granting television channel 10 in Rochester, New York, to WHEC Broadcasting Company, Inc. and Veterans Broadcasting Company, Inc., dismissing Appellant's Petition for Reconsideration and refusing to reinstate the application which Appellant had submitted for channel 10 and to designate the WHEC, Veterans and Appellant's applications for comparative hearing.

(3) This affidavit is made in support of Appellant's motion requesting an interlocutory injunction, pending final hearing and determination of the appeal, ordering WHEC and Veterans to account for the profits derived from their operations on channel 10 in Rochester since March 11, 1953,

the date of the illegal grant, and to impound the said profits pending final determination of the appeal.

(4) Federal Broadcasting System, Inc., under license from the Commission, operates standard broadcast station WSAY in Rochester.

(5) Early in 1948, Federal Broadcasting System, Inc. began preparation of an application for construction permit to operate a television station in Rochester, New York. The only satisfactory antenna site then available in Rochester was Pinnacle Hill, which was owned and controlled by the licensee of Station WHAM. Therefore, Federal Broadcasting System, Inc. commenced negotiations with Mr. William Fay, general manager of WHAM, for the location of its television antenna system on Pinnacle Hill. Mr. Fay, however, refused to permit installation on WHAM's property of the television transmitter proposed by Federal Broadcasting System, Inc., notwithstanding the requirement of the Commission's rules providing for joint use in such circumstances. By telegram dated April 19, 1948 addressed to counsel of Federal Broadcasting System Mr. Fay stated: "We do not wish to make further commitments regarding use by WSAY of our site on Pinnacle Hill." Federal Broadcasting System protested to the FCC against Mr. Fay's rejection of Federal's proposal, but the Commission took no action. Federal was unable to provide the Commission with complete engineering data because of its inability to arrange for a satisfactory antenna site but completed the application with exception of the engineering. Federal then deferred the filing of the said application pending further negotiations with respect to a satisfactory antenna site. Thereafter the Commission imposed a "freeze" on the further construction of television stations.

(6) Upon the termination of the said "freeze" order with the issuance of the Sixth Report and Order by the Federal Communications Commission in April, 1952, Fed-

eral Broadcasting System, Inc. took immediate steps to perfect its application for Channel 10 in Rochester. Negotiations were initiated with WHAM to secure the right to use property on Pinnacle Hill different from and higher than the transmitter site of WHAM-TV. Thereafter Federal was compelled to enter into time consuming investigations and negotiations not only to acquire the necessary property but also to secure the consent of the town of Brighton, New York to erect a 200 foot tower on the said property. The delay in securing the consent of the said municipality stems primarily from the objections filed with the municipal officials by WHAM and the American Telephone and Telegraph Company, which owned property adjacent to that owned by Federal Broadcasting System, Inc. Indeed, the delay in filing the application for Channel 10 in Rochester to the Commission was due solely and entirely to the oppositions set up by the competitors of Federal Broadcasting System, Inc. to secure municipality approval of the proposed engineering site. Meanwhile, WHAM, the said competitor which was responsible for blocking the consummation of Federal's attempt to perfect suitable engineering arrangements, contracted with WHEC and Veterans for the installation of television antennas to be owned by the said companies on the WHAM-TV tower on Pinnacle Hill.

(7) During the said period, when Federal Broadcasting System, Inc. was attempting to negotiate for a final engineering site, the applications filed with the Commission by WHEC and Veterans specified unlimited hours of operation on Channel 10 and were mutually exclusive. There was no Commission procedure for processing the television broadcast applications of WHEC and Veterans other than that which would entail a hearing after a delay of many months. The first public notice which Federal received that the processing of the applications of WHEC and Veterans might be expedited was on March 9, 1953, when the Commission released an announcement of the filing of

amendments requesting that the Commission authorize the stations proposed by WHEC and Veterans to share time on Channel 10. Shared time authorization permits the division of the use of the same channel at different times of the day by different operators each with its own network facilities, thus denying the public access to full programming. It is a dissimilar and inferior service to full channel occupancy of which the public in the Rochester market had no notice or opportunity for protest. Within 40 hours the Commission, on March 11, 1953, granted the applications as amended. The Commission members could not have even read the many applications thus advanced and had no basis for formal consideration of them.

(8) The Appellant, Federal Broadcasting System, Inc., did not have sufficient time after the public notice of March 9, 1953 to complete its application and file it so as to insure the institution of a comparative hearing. It was not until March 17, 1953 that the Appellant was able to finalize its application for Channel 10 in Rochester, New York. However, Federal Broadcasting System, Inc. was, as of March 4, 1953, when the amendments of WHEC and Veterans were filed, and thereafter and for many years prior to this period, a prospective bona fide applicant for Channel 10 in Rochester, New York.

(9) On March 17, 1953 the Appellant filed a protest against the grants of the amended applications of WHEC, Inc. and Veterans Broadcasting Company, Inc. The Federal Communications Commission, in its Memorandum Opinion and Order of April 1, 1953 granting the protest and designating the WHEC and Veterans applications for hearing on appropriate issues thereafter to be delineated by the Commission, concluded that Appellant, having alleged economic injury as a licensee of standard broadcast station WSAY, was a "party in interest". On July 27, 1953, however, the Commission, acting upon a petition for reconsideration filed by WHEC and Veterans, reinstated the grants on the ground that the Appellant's statement

of "facts, matters and things relied upon" was not strong enough to meet the requirements of Section 309(e) of the Communications Act of 1934, as amended. There were no adequate or detailed findings to support this action. Soon thereafter WHEC and Veterans commenced construction of television stations to operate on Channel 10 in Rochester and subsequently commenced telecasting.

(10) The impact of the television operations of WHEC and Veterans upon the existing economic welfare of Federal Broadcasting System's standard radio broadcast station has been severely detrimental. The period since commencement of the operation of television service on Channel 10 by WHEC and Veterans is one in which non-network, individual radio operation has witnessed extremely sharp and rapid increases in revenues throughout the radio industry. Independent radio had been experiencing a prosperity stemming from the proven ability of the radio medium to compete with the televison medium on a compatible basis. It was during the latter part of 1953 that the advertising industry learned that large portions of the advertising dollar could be effectively channeled so as to support certain types of radio programs of the non-network variety. It was this type of programming service which Station WSAY, Appellant's station in Rochester, provides the public in that community.

(11) Appellant's standard broadcast station, however, has not enjoyed this pronounced increase in independent radio revenue. Indeed, Appellant's standard broadcast station has suffered a severe deviation from the trend under competitive conditions which would not have occurred but for the illegal grant of television permits to WHEC, Inc. and Veterans Broadcasting Company, Inc. and the coordination of their radio and television operations with network support and collusion.

(12) The injury and losses inflicted upon Appellant's broadcast station stem from several causes. First, the

fact that the Appellant competes in the standard broadcast field with the standard broadcast stations of WHEC and Veterans, who are television owners and operators, has unduly enhanced the prestige of the respective radio stations of WHEC and Veterans at the tremendous expense of good will and profits of Appellant's radio station. The advertising industry has been put on notice that the Federal government through the Commission has recognized the ability of WHEC and Veterans to operate in the television and radio field and has not seen fit to give equal consideration to the Appellant's qualifications as an operator in the public interest. This sudden shift in the intangible field of good will and commercial profits has impaired the ability of the Appellant to secure time sales which would normally flow to its standard broadcast station.

(13) A second impairment to the Appellant's commercial position in the standard broadcast medium is its competitive inability to secure network affiliations as a direct result of the grant to WHEC and Veterans of television licenses. It is obvious that not until television channel 10 was granted to the Veterans Broadcasting Company, Inc. was that company able to secure the network affiliation of the American Broadcasting Company for its station WVET. This is more than a coincidence. It is a commercial arrangement which fulfilled the desire of the American Broadcasting Company to affiliate with a VHF television station in Rochester. The impact on the advertising industry is exemplified by the advertisement appearing in the magazine "Sponsor" on January 25, 1954, attached hereto as Exhibit A as verified by this affidavit. It clearly demonstrates that Veterans Broadcasting immediately exploited its position, because desirable in the radio broadcasting medium for the first time in many years of operation, obviously as a result of its receipt of a television grant. Appellant wishes to make it clear that the said network affiliation has enhanced the competitive potential of the Veterans Broadcasting station, not because the said station will profit so much from the receipt of network revenue but because the assured supply of network

programming enables that radio station to maintain its listening audience during short periods adjacent to the network programming and thus attracts the very lucrative revenue which is normally available to non-network stations as well as to network affiliated stations.

(14) Appellant emphasizes that the economic injury inflicted upon its standard broadcast station as a result of a television grant to a standard broadcast competitor in the city of Rochester does not depend solely upon any illegal trade practices, tie-in arrangements or combination sales in this particular instance but is a material economic result of the said competitor's owning both a radio and television station.

(15) The loss to Appellant's standard broadcast operation has not been only one of revenue. There has been an impairment of its ability to secure capital, should the appellant have desired it, as a result of its loss of prestige and good will in the light of the fact that it is precluded from ownership of a VHF television station while its competitors own one.

(16) Appellant has been subjected to additional injury simply as a result of the fact that it has been unable to engage in a television operation for which it would have had a fair opportunity to receive competitive consideration by the Federal Communications Commission if the alleged illegal grant had not been made to appellant's competition. The loss of that opportunity to engage in an operation on channel 10 in Rochester may be estimated at many millions of dollars. Appellant states that, given a fair opportunity to compete for Channel 10 in Rochester, it is prepared to offer financial, technical and program proposals designed to serve the public interest, convenience and necessity, and that its qualifications as a licensee of a television broadcast station are vastly superior to those to whom the grants have been illegally made. Appellant alleges that the continuance of the operation on television Channel

10 in Rochester by WHEC and Veterans Broadcasting Company, Inc. will inflict irreparable injury on the Appellant pending final determination of this case upon its merits, and that the maintenance of the status quo as it existed prior to the Commission's making an illegal grant is absolutely essential. Appellant recognizes that the public interest justifies the continuance of television broadcasting service in the City of Rochester. In the light of this conclusion, therefore, Appellant further proposes that the said stations be operated on an interim basis in such manner that the existing owners account to the Court for profits derived since the said illegal grant from the operation of the stations, and that the same be impounded for equitable distribution after final determination of the rightful licensee of the frequency pursuant to Section 309 of the Communications Act of 1934, as amended. Appellant believes and states unequivocally that this proposal is practicable as a means of preventing injury while maintaining the status quo pending determination of the case on the merits, and of continuing the service now provided on Channel 10 to the people of Rochester. Alternatively, subject to the Court's discretion, Appellant states a willingness to participate in an interim corporation in which Appellant invests capital on a basis equal to the combination of WHEC and Veterans Broadcasting and incurs liability on an equal basis for operating expenses. Thereafter, upon the final conclusion of the administrative procedure required by the Communications Act of 1934 as amended, Appellant is willing to comply with the final determination of the Commission and either surrender or take over the assets and liabilities of the station as then existent.

(17) A grant of such relief would merely effect the maintenance of the status quo. Moreover, the public interest would be further protected. It would be assumed that the best of the potential competitors for Channel 10 in Rochester would be selected ultimately, in accordance with

the statutory criterion of public interest, convenience and necessity.

GORDON P. BROWN
Gordon P. Brown

Subscribed and sworn to before me this 2nd day of June, 1954.

ROSE M. BROWNING
Notary Public

(SEAL)

My commission expires
August 31, 1956

(4) Statement of Appellee re Certiorari

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,252

FEDERAL BROADCASTING SYSTEM, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WHEC, INC., *Intervenor,*

VETERANS BROADCASTING COMPANY, INC., *Intervenor.*

Statement of Appellee With Respect to Filing of Petition for Certiorari

The Federal Communications Commission, appellee in the above-entitled action, wishes to advise the Court that, after consultation among counsel for the Commission, the Commission and the Solicitor General's Office, it has been determined that a petition for certiorari on behalf of the Commission will not be filed in the Supreme Court in this action.

Respectfully submitted,

WARREN E. BAKER
General Counsel

J. SMITH HENLEY
Assistant General Counsel
Federal Communications
Commission

September 8, 1955

End